**MOHD DAUD MAHMOOD**

**v.**

**SURUHANJAYA PERKHIDMATAN AWAM MALAYSIA & ANOR**

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[CIVIL SUIT NO: S2(S8)-21-152-1996]
29 AUGUST 2001

***ADMINISTRATIVE LAW:*** *Rules of natural justice - Dismissal of officer as a result of disciplinary action taken against him - Whether reasons or grounds of decision given - Whether there was a necessity to give reasons or grounds of decision*

***ADMINISTRATIVE LAW:*** *Rules of natural justice - Dismissal of officer as a result of disciplinary action taken against him - Officer denied opportunity to make plea in mitigation - Whether rules of natural justice infringed*

The plaintiff was the Penolong Pegawai Kebudayaan attached to the Pusat Kebudayaan Kesenian dan Pelancungan Wilayah Timur, Kota Bahru, Kelantan. The first defendant was the disciplinary authority of the plaintiff. By a letter dated 23 March 1993, the plaintiff was informed by the first defendant that pursuant to the Public Officers (Conduct & Discipline) (Chapter "D") General Orders 1980 – General Order 26, the first defendant had decided to take disciplinary action against the plaintiff with a view to his dismissal from service.

The plaintiff then duly made his representations by his letter dated 30 April 1993. By its letter dated 11 November 1993, the first defendant informed the plaintiff that at its meeting held on 1 November 1993, where the plaintiff's case was considered in its entirety, the first defendant had decided to dismiss him forthwith.

The plaintiff prayed *inter alia* for a declaration that the dismissal of the plaintiff from service by the first defendant at its meeting on 1 November 1993 with effect from 2 November 1993 is wrong in law, null and void, inoperative and of no consequence and that the plaintiff is still an employee in the public service of the Federation. The plaintiff contended that (a) there had been an infringement of the provisions of art. 135(2) of the Federal Constitution and O. 23 of the Public Officers (Conduct & Discipline) (Chapter "D") General Orders 1980 in that the plaintiff was not given an opportunity to make a plea in mitigation after the decision to dismiss him was taken by

the first defendant; and that (b) the first defendant did not give reasons or grounds of its decision to dismiss the plaintiff thereby infringing the rules of natural justice and the decision-making process in relation to the plaintiff's dismissal is therefore fatally flawed.

**Held:**

**[1]** Detailed procedures are contained in the Public Officers (Conduct & Discipline) (Chapter "D") General Orders 1980 and they are in accord with the concept of natural justice and procedural fairness. There is no separate right to make representations upon punishment that ought to be meted out to the officer to be dismissed or reduced in rank. According to para. 4 of General Order 26 of the Public Officers (Conduct & Discipline) (Chapter "D") General Orders 1980, the first defendant is not even required to make a finding of guilt which strongly indicates that there is only one hearing for a show cause letter issued under that General Order. No injustice therefore had been occasioned to the respondent by the failure to hear his mitigation separately. (p 443 b)

**[1a]** Since there was no requirement to even make a finding of guilt, there was therefore no requirement to give reasons. (p 444 e)

*[Application dismissed.]*

**Case(s) referred to:**

*Hjh Halimatussaadiah Hj Kamaruddin v. Public Services Commission, Malaysia & Anor [1994] 3 CLJ 532* ***(foll)***

*Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal [2000] 3 CLJ 224* ***(foll)***

*Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal [2001] 2 CLJ 525* ***(foll)***

*Ministry of Human Resources & Ors v. National Union of Hotel, Bar and Restaurant Workers, Semenanjung Malaysia & Anor Appeal [1997] 1 CLJ 215* ***(refd)***

*Rohana Ariffin & Anor v. Universiti Sains Malaysia [1989] 1 MLJ 487* ***(dist)***

*Selvaraju Ponniah v. Suruhanjaya Perkhidmatan Awam, Malaysia & Anor [1999] 5 MLJ 678* ***(dist)***

*Utra Badi K Perumal v. Lembaga Tatatertib Perkhidmatan Awam & Anor [1998] 2 CLJ 306* ***(foll)***

**Legislation referred to:**

Federal Constitution, art. 135(2)

Public Officers (Conduct and Discipline) (Chapter "D") General Orders 1980, GO 23, 26(4), (5)

*For the plaintiff - Karpal Singh (Ramkarpal Singh); M/s Karpal Singh & Co*
*For the defendants - Ahmad Kamal Md Shahid; AG's Chambers*

*Reported by Mariette Peters-Goh*

## JUDGMENT

### Facts

**RK Nathan J:**

The plaintiff was at all material times, the penolong pegawai kebudayaan attached to the Pusat Kebudayaan Kesenian dan Pelancungan, Wilayah Timur, Kota Bahru, Kelantan. The 1st defendant was at all material times the disciplinary authority of the plaintiff and was acting as the servant and/or agent of the 2nd defendant. By a letter dated 22 March 1993 the plaintiff was informed by the 1st defendant that pursuant to GO. 26 of the Public Officers (Conduct and Discipline) (Chapter "D") General Orders 1980 (GO) the 1st defendant had decided to take disciplinary action against the plaintiff with a view to his dismissal from service. The plaintiff then duly made his representations by his letter dated 30 April 1993. By its letter dated 11 November 1993 the 1st defendant informed the plaintiff that at its meeting No. 1748 held on 1 November 1993 where the plaintiff's case was considered in its entirety, the 1st defendant had decided to dismiss him forthwith, that is, as of 2 November 1993.

### Case For The Plaintiff

In its pleaded case the plaintiff contended that his dismissal from service was null and void and of no effect on the following grounds:

(i) There has been infringement of the provisions of art. 135(2) of the Federal Constitution and O. 23 of the said General Orders in that the plaintiff was not given an opportunity to make a plea in mitigation after the decision to dismiss him was taken by the 1st defendant.

(ii) The 1st defendant did not give any reasons or grounds for its decision to dismiss the plaintiff thereby infringing the rules of natural justice and the decision-making process in relation to the plaintiff's dismissal is therefore fatally flawed.

(iii) The 1st defendant's act in making the plaintiff's dismissal effective from 2 November 1993 is illegal and unlawful.

(iv) The plaintiff's dismissal is not on the authority of a valid or lawful power.

The plaintiff therefore prayed for:

(a) A declaration that the dismissal of the plaintiff from service by the 1st defendant at its meeting on 1 November 1993 with effect from 2 November 1993 is wrong in law, null and void, inoperative and of no consequence and that the plaintiff is still an employee in the public service of the Federation.

(b) An order that an account be taken of all arrears of salaries, emoluments and other benefits due to the plaintiff and that same be paid to him thereafter.

(c) Damages.

(d) Interest on the adjudged sum on such rates and for such periods deemed fit and proper by the court.

(e) Costs.

(f) Any further or other relief deemed fit and proper by the court.

**Case For The Defence**

In their defence the defendants averred that their letter dated 22 March 1999 also contained the charges against the plaintiff. Upon receiving the plaintiff's representation the 1st defendant, having considered the charges and the plaintiff's representation, set up a committee of enquiry pursuant to GO. 26(5) Chapter "D". The committee of enquiry investigated the matter and on 29 September 1993 the plaintiff personally attended the said enquiry and gave evidence. The defendants maintained that the said dismissal was in order and prayed for the suit to be dismissed with costs.

**Findings Of The Court**

Each party called only one witness. Mr Karpal Singh for the plaintiff indicated during his submission that he was proceeding only on grounds (i) and (ii).

(i) No opportunity to mitigate

The plaintiff relied heavily on the decision of *Utra Badi a/l K Perumal v. Lembaga Tatatertib Perkhidmatan Awam & Anor* [1998] 2 CLJ 306. The facts of this celebrated case which went through the portals of all three courts of this country are as follows. The plaintiff, a hospital attendant, was an employee of the second defendant. A sample of urine taken from him was tested positive for morphine. The first defendant requested the plaintiff to show cause why disciplinary action should not be taken against him on the ground that he was a drug addict. The charge was made under GO. 26 of the Public Officers (Conduct and Discipline) (Chapter "D") General Order 1980 which contained two alternative punishments against him, namely to dismiss or to reduce in rank. The plaintiff gave his explanation on the charge proffered against him. The first defendant dismissed the plaintiff. The plaintiff's appeal to the appeal board was rejected. The plaintiff applied for a declaration that his purported dismissal was null and void. There were three issues before the court, ie, that: (i) the wording in the show cause letter which contained two alternative punishments nullified the charge for want of clarity; (ii) the first defendant

has taken into account other material information which had never been put to the plaintiff, and the plaintiff was not given a reasonable opportunity to be heard on the other relevant information that appeared to have been considered in the decision making process which led to his dismissal; (iii) that the first defendant has failed to give the plaintiff a reasonable opportunity to mitigate.

Vincent Ng J held that the right of the plaintiff to be heard in mitigation was encompassed in GO. 23 of the General Orders and in art. 135(2) of the Federal Constitution and therefore it would be unjust to deny the civil servant an opportunity to be heard in mitigation before punishment is imposed on him as the punishment itself involved a further decision-making process. Holding that the plaintiff had been wrongly dismissed the learned trial judge granted him the reliefs which he sought. The Court of Appeal (see *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal* [2000] 3 CLJ 224 CA) in dismissing the appeal went on to hold that procedural fairness demanded not only the right in a public servant to make representations on the truth of the charges framed against him, but that it included the right, after a finding of guilt is made against him, to make representations on the question of punishment and that he ought to have been given the opportunity to plead in mitigation before any punishment was meted out against him. This the court held was in line with the provisions of GO. 23 and further, such a reasoning harmonised with the provision of art. 135(2) of the Federal Constitution. Having obtained leave, the respondent appealed to the Federal Court.

Since my decision would depend on the decision of the Federal Court, parties by consent agreed that I defer my decision until the appeal on *Utra Badi* to the Federal Court, was decided. The Federal Court granted leave for it to consider two questions arising from *Utra Badi*. They were:

1. Whether a show cause letter issued by a Public Service Disciplinary Authority which directed a member of a public service's attention to the possibility of punishment of dismissal or reduction in rank sufficiently complied with the provisions of art. 135(2) of the Federal Constitution that no member of a public service shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard?; and

2. Does art. 135(2) of the Federal Constitution require the relevant disciplinary authority to afford the public officer an oral hearing?

In a landmark decision the Federal Court in *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal* [2001] 2 CLJ 525 FC allowed the appeal. In delivering the judgment of the court, Abdul Malek Ahmad FCJ very succinctly summarised the court's reasoning with these few lines at p. 551:

> … we are of the view that the General Orders, in detailing the procedures therein, have sufficiently complied with art. 135(2) of the Federal Constitution and, in the process, are in accord with the concept of natural justice and procedural fairness. As succinctly stated by the learned leading senior federal counsel in his submissions and as propounded in the long line of authorities considered, there is certainly no separate right to make representations upon the punishment that ought to be meted out to the officer to be dismissed or reduced in rank. In fact, under para. (4) of General Order 26 of the General Orders, the first appellant is not even required to make a finding of guilt which strongly indicates that there is only one hearing for a show cause letter issued under that General Order. We therefore find that no injustice had been occasioned to the respondent by the failure to hear his mitigation separately.

The highest court of the country thus answered the first question in the affirmative. With regard to the second question, the court ventured the opinion that it may have fallen into error in granting leave on the 2nd question. In any case, it answered the said question in the negative. In the circumstances, bound as I am by this decision, I must find against the plaintiff on this ground.

(ii) No reasons given for dismissal

The next complaint is that the 1st defendant did not give any reasons or grounds for its decision to dismiss the plaintiff, thereby infringing the rules of natural justice. It is not surprising that the plaintiff was unable to produce any single authority to substantiate this argument. The General Orders relating to dismissal do not provide for the 1st defendant to state its grounds for dismissal. Mr Karpal relied on *Rohana bte Ariffin & Anor v. Universiti Sains Malaysia* [1989] 1 MLJ 487. In that case the plaintiff and another applicant applied by way of *certiorari* to quash two separate decisions of the council of the respondent university which dismissed their **appeals** (emphasis provided) from the decision of the relevant disciplinary authority. The council, whilst confirming the finding of guilt recorded by the disciplinary authority against the applicant Rohana on the first charge of making a public statement on a matter that would be detrimental to the policies and decisions of the respondent university however allowed her appeal against sentence by substituting, in place of the punishment of a warning and a reduction of salary by two salary increments to last for one year from 1 February 1986, a warning and a reduction of salary by one increment for a period of one year from 21 February 1986 to 20 February 1987. It was argued in that case that no reasons were given for the decision arrived at. In respect of this argument Edgar Joseph J (as he then was) had this to say at p. 496:

> ... I consider that if the requirement for reasons is essential for every *quasi* judicial order, then it would place administrative bodies in a very difficult position.

> But, having said that, I accept that there are certain cases where reasons for decision should be given particularly when there is a right of appeal, since an appeal is merely a continuation of proceedings by way of rehearing and litigants as well as the appellate tribunal are entitled to know the reasons for the finding.

The case before me is not one that was decided on appeal. There is no reason therefore for the defendants to give their reasons. In fact as found by the Federal Court in *Utra Badi (supra)* under GO. 26(4) the disciplinary board was not even required to make a finding of guilt. The Federal Court relied on the decision of the then Supreme Court in *Hjh Halimatussaadiah bte Hj Kamaruddin v. Public Services Commission, Malaysia & Anor* [1994] 3 CLJ 532 wherein Mohamed Dzaiddin SCJ (as the present Chief Justice then was) upheld the decision of Eusoff Chin J (as the Chief Justice then was) when he heard the said case at first instance and decided that GO. 26(4) of the General Orders "D" did not require the public services commission to make a finding of guilt before dismissing the plaintiff. He held that the public services commission was only required to decide whether the plaintiff's explanation had exculpated her to the satisfaction of the public services commission.

It would seem therefore that no reasons need be given. In any case so long as there is no requirement to even make a finding of guilt, it is my judgment that there is therefore no requirement to give reasons. In fact in *Selvaraju a/l Ponniah v. Suruhanjaya Perkhidmatan Awam, Malaysia & Anor* [1999] 5 MLJ 678, Mr Karpal Singh raised the same argument and also relied on *Rohana bte Ariffin*. I dismissed this argument for the same reason relying on the Court of Appeal's decision in *Ministry of Human Resources & Ors v. National Union of Hotel, Bar and Restaurant Workers, Semenanjung Malaysia & Anor Appeal* [1997] 1 CLJ 215. In the circumstances, this suit is dismissed with costs.